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Whitney Parry v. J. H. Crosby, George A. Swapp, and David L. Pugh : Brief of Appellant

Utah Supreme Court

Harley W. Gustin; Attorney for Plaintiff and Appellant;

No. 6225

In the Supreme Court of the State of Utah

WHITNEY PARRY,

Plaintiff and Appellant,

vs.

J. H. CROSBY, as Justice of the Peace of Kanab Precinct, Kane County, State of Utah, GEORGE A. SWAPP, as Sheriff of Kane County, State of Utah, and DAVID L. PUGH, as County Attorney of Kane County, State of Utah,

Defendants and Respondents.

APPELLANT'S BRIEF

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INDEX OF AUTHORITIES.

PAGE

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This appeal involves the construction of Section 103-25-1, Revised Statutes of Utah, 1933, pertaining to the seizure and destruction of alleged gambling paraphernalia. The paraphernalia involved consists of so-called "slot machines." The seizure and threatened destruction of the machines and confiscation of money contained therein is attacked primarily on the ground that the seizure was without due process of law.

STATEMENT OF THE CASE.

On June 12, 1939 four so-called slot machines were taken from the possession of appellant at the Parry Lodge in Kanab, Utah. At the time of the seizure of the machines, respondent sheriff had initiated proceedings in the Justice's Court, Kanab Precinct, Kane County wherein the State of Utah appeared as plaintiff and Whitney Parry, the appellant, was named as defendant. The proceedings were commenced by the filing of an affidavit for attachment signed by the sheriff and in which affidavit he deposed "That he has reason to believe and does believe that the said Whitney Parry has in his place of business certain Slot Machines which are being operated contrary to law." (Abs. p. 10; Tr. pp. 16-17) Upon this affidavit the respondent Justice of the Peace issued a writ of attachment commanding the sheriff "to attach and safely keep any and all Slot Machines belonging to the above named defendant (Parry) which may be found in his place of business, known as the Parry Lodge in Kanab, Kane County, State of Utah, until disposed of by order of Court." (Abs. p. 11; Tr. p. 17). On the same day, the respondent sheriff made his return on the writ that he had attached "four slot machines and that he was holding the same to be disposed of by order of court." (Abs. p. 12; Tr. pp. 17-18)

On the 7th day of July, 1939 respondent Justice of the Peace issued a "Citation to Show Cause" in the case entitled in his court—The State of Utah, plaintiff, vs. Whitney Parry, defendant,—requiring Parry to show

cause, if any he had, why the slot machines, which were taken from him under writ of attachment issued by the court, should not be destroyed and the money in them forfeited to Kane County. (Abs. pp. 12-13; Tr. p. 18)

On the 26th day of July, 1939 and before any hearing on the Citation to Show Cause, appellant filed in the District Court of the Sixth Judicial District in and for Kane County, State of Utah his complaint against the respondents praying for injunctive relief. (Abs. pp. 1-5; Tr. pp. 1-5) A temporary restraining order was issued by the District Court (Abs. pp. 5-6; Tr. p. 5) and the matter came on for hearing upon an order to show cause (Abs. pp. 6-7; Tr. p. 9) on the 15th day of August, 1939; the issues being joined by an answer filed on behalf of the respondents. (Abs. pp. 7-8; Tr. p. 11)

The gist of appellant's complaint in the District Court was that the devices taken by respondents were taken without due process of law or any legal proceeding whatsoever and that the respondents threatened to destroy the devices and to confiscate money of undetermined amount to appellant's detriment. The answer admits the seizure of the four devices containing money but alleges that the devices were taken by due process of law "and that said devices were gambling devices and were being operated by the said plaintiff and his agents contrary to law."

At the trial of the injunction suit Mr. Parry testified that he was at the Parry Lodge on the night of June 12th when the machines involved were taken by the sheriff

but that he was not served with any papers. (Abs. pp. 21-22; Tr. p. 38) At this time the Parry Lodge was definitely closed to the public. A motion picture company had taken under lease all of the accommodations and there was a sign on the front of the lodge to the effect that the place was closed. The lodge was being operated as a private home would be under lease. (Abs. p. 22; Tr. p. 29) Appellant testified, on cross examination, as to a conversation with the sheriff on the night that the machines were taken. He testified that the sheriff said, "We have come to get your slot machines." The appellant said, "By what authority are you taking these slot machines?" To which the sheriff replied, "We have a paper made out by the County Attorney and signed by the Justice of the Peace." (Abs. p. 23; Tr. p. 43)

The record is silent as to the use of the machines on June 12th or at any other time except that it was stipulated, subject to the objection that such testimony would be irrelevant and immaterial, that a Mr. Luke, a road patrolman, if called on the part of the defendants, would testify that a day or so before the machines involved were picked up that he saw the machines being played "in the ordinary way" at the Parry Lodge. (Abs. p. 25; Tr. pp. 30, 35, 45)

The court thereafter made and entered its Findings of Fact, Conclusions of Law and Judgment (Abs. pp. 8-17; Tr. pp. 15-22) dissolving, vacating and setting aside the temporary restraining order theretofore issued and dismissing appellant's action with costs to the respond-

ents. It is from that judgment that this appeal is prosecuted.

STATEMENTS OF ERRORS RELIED UPON.

Ten assignments of error are urged. Common to all of the assignments is the contention that the proceeding in the Justice's court should have been a proceeding *in rem* rather than a proceeding *in personam* to accomplish what the respondents apparently intended to accomplish; i.e., the destruction of the so-called slot machines and the confiscation of the money in them.

The first assignment goes to the testimony of the witness Luke. Luke's testimony that "a day or so" before the machines were picked up he saw them being played "in the ordinary way" in the Parry Lodge could only be relevant and material to justify the respondents in taking some action in a proceeding in personam. The proceeding in the Justice's court being not based upon any crime allegedly committed by Parry, the testimony was obviously irrelevant and immaterial as justification for the seizure.

Assignments 2 and 3 attack the trial court's rulings in admitting in evidence respondents' Exhibits "A" and "B"—Exhibit "A" was the Affidavit for Attachment and Exhibit "B" the Writ of Attachment—both entitled in the Justice's court with the State of Utah as plaintiff and Whitney Parry as defendant. These exhibits were

objected to upon the ground that they were incompetent, irrelevant and immaterial and that no proper foundation had been laid for their admission, the theory of the respondents being that the exhibits justified or went to justify the seizure of the machines.

Assignment No. 4 is self-explanatory. By this assignment appellant challenges the propriety of the trial court's refusal to strike a portion of an answer of respondents' witness Chamberlain. The motion was made on the ground that the portion of the answer referred to was indefinite, vague, conjectural and otherwise incompetent. When the witness said that the sheriff "apparently" offered Exhibit "B" to appellant or offered it to him to read, the witness stated nothing but a conclusion. His testimony did not rise to the dignity of a statement of fact.

Assignments 5, 6 and 7 go to specific findings or portions of findings of fact adopted by the trial court and are complained of on the ground that the portions indicated are not supported by but are contrary to the evidence.

Assignments 8 and 9 are directed to the conclusions of law drawn by the trial court from the findings of fact and assignment No. 10 attacks the judgment on the ground that it is contrary to law and that the evidence is insufficient to sustain or justify the same in the particulars indicated by the assignment.

STATEMENT OF PARTICULAR QUESTIONS INVOLVED.

Was the proceeding in the Justice's court sufficient to give that court jurisdiction to seize or to order destruction of the so-called slot machines and the forfeiture of the money contained in them to Kane County?

ARGUMENT.

This court in the case of *Utah Liquor Control Commission v. Wooras,* (Utah) 93 Pac. (2d) 455, has reiterated many of the fundamental principles involved in this appeal. The decision in the Wooras case constitutes a terse, comprehensive and clear restatement of what constitutes due process of law in actions in personam as well as in actions in rem.

In the Wooras case two questions were presented for determination. "1. Were the issues raised by the pleadings such as to make relevant and material certain testimony excluded by the court? 2. Were the pleadings and the proceedings by which the property was seized sufficient to vest the court with power to order a confiscation of the property?" The statute under which the Liquor Commission proceeded in the Wooras case was different in a number of particulars from the statute involved in this case but the fundamental principles are the same.

In the case at bar, the respondents sought to invoke the right of seizure of property and its destruction in

an action in personam and not in rem. The affidavit of the sheriff, the initial proceeding in the Justice's court, was not sufficient for any purpose. It was not a complaint, a petition or an affidavit charging Parry with the commission of a crime. Section 103-25-7, Revised Statutes of Utah, 1933, makes it a misdemeanor for a person to keep or operate in his place of business the device or instrument commonly known as a "slot machine" for gambling. There is no averment in the affidavit made by the sheriff that Parry kept such a device or machine "for gambling." But in any event the other papers signed, prepared and acted upon by respondents indicate, not the purpose to charge Parry with the commission of a crime, but to obtain an order of destruction of property and which proceeding is essentially one in rem. We quote from the Wooras case as follows:

> "In libel actions for confiscation, where the proceeding is essentially against the property as such, the res itself must be brought before the court by and through such process as the law has decreed to place it within the power and control of the court."

If the respondents were attempting to act within the purview of Section 103-25-1, Revised Statutes of Utah, 1933, the affidavit of the sheriff was wholly insufficient as legal process not only because the affidavit referred to Parry as an individual but also in that it lacked the averment upon which such a seizure could be predicated.

So far as is material to the issues herein involved, the section reads:

> "* * * it shall be the duty of all * * * peace officers whenever it shall come to the knowledge of such officer that any person has in his possession any * * * slot machines * * * used or kept for the purpose of playing for money, or for tokens redeemable in money * * * or that * * * slot machines * * * used or kept for the purpose aforesaid may be found in any place, to seize and take such * * * slot machines and convey the same before a magistrate of the county in which such devices shall be found; * * *"

There is nothing in the affidavit, respondents' Exhibit "A", which indicates that the offending slot machines were used or kept for the purpose of playing for money or for tokens redeemable in money and it is upon that ground only that the machines, if properly proceeded against, can be seized.

The respondents in the Justice's court, whether the action be termed one in personam or in rem, apparently proceeded on the theory that a so-called slot machine, regardless of its use, was contraband and subject to seizure. In the Wooras case, supra, Justice Pratt in his concurring decision stated:

> "I concur but wish to add this: If the property seized has but one use and that an illegal one, no one may claim it, as no one has a property right in an illegal thing—under such circumstances the invalidity of the process of seizure is immaterial.

> If any of the property seized in this case is of that class, then it should not be returned."

There is nothing in the case at bar to indicate that the machines seized by respondents had but one use, to-wit, an illegal use and there is nothing in the record to indicate that the machines, if used for any purpose, were "used or kept for the purpose of playing for money, or for tokens redeemable in money." Respondents in their proceeding in the Justice's court apparently took the position that a slot machine described as such, by name only, and regardless of its use was per se an illegal thing in which there was no property right—such is not the law.

The case of *Lee v. City of Miami,* 163 So. 486 (Florida), is a case that is extensively annotated on the particular subject as to whether or not a slot machine is *per se* contraband in 101 A. L. R. 1126. The first head-note of the A. L. R. on page 1115 is as follows:

> "Coin-operated vending machines with premium features which may or may not vend for each coin deposited an article of merchandise, coin-operated skill machines which may or may not pay a reward for skillful operation, and trade machines giving to patrons at intervals the right to receive premiums, are not lotteries per se, so that a statute licensing and regulating the same does not conflict with a constitutional provision prohibiting lotteries."

By reason of the comprehensive annotation on the general subject, we have refrained from picking out in-

dividual or isolated cases. The annotation itself will give the court a lead to many appropriate cases without reiteration on our part.

Where a thing can be used for a purpose other than an illegal one, it must be proceeded against with the same formality and subject to the same due process of law as in the case of individuals. This elemental proposition is very ably stated by this court in the Wooras case, speaking through Justice Larson:

> "The jurisdiction of the courts to condemn or forfeit property is dependent upon statute, and the prescribed procedure is in general regarded as exclusive and in a sense jurisdictional. United States v. Franzione, 286 F. 769, 52 App. D. C. 307. All these proceedings are civil in their nature, and the res is proceeded against as a thing guilty, and is a party to the action. Other parties asserting an interest in the property which they wish to defend, may come into the action, set up their rights and have them determined."

In the case at bar and in a proceeding against the machines, they are the guilty thing; it was not sufficient to merely describe the machines as slot machines but it was necessary for them to allege they were "used or kept for the purpose of playing for money, or for tokens redeemable in money."

That this averment by complaint, petition or affidavit is essential becomes even more clear when considering the last portion of Section 103-25-1 where it is declared that "if such magistrate shall determine that

the same are used or kept for the purpose of being used at any game or games of chance described in this chapter, it shall be his duty to destroy the same." In other words, the magistrate cannot order a confiscation of the property unless he finds that the property was used or kept for the purpose of being used as a game of chance. By the mere use of the generic term "slot machines" no court, sheriff, county attorney is entitled to seize the machines without attaching to them the element of gambling; without that averment the thing proceeded against is guilty of no crime. The element of gambling must be present to charge an individual with a crime under Chapter 25 of Title 103, Revised Statutes of Utah, 1933, and when paraphernalia is sought to be seized and destroyed it must be shown that not only the element of gambling exists but also that the machine or paraphernalia itself was used or kept for the purpose of playing for money or for tokens redeemable in money.

For the reasons stated, the evidence sought to be excluded and the testimony sought to be stricken was irrelevant and immaterial.

In the Wooras case it is said:

> "It is elemental that before a court can lawfully determine any rights it must not only be a court empowered by law to determine such rights, but it must have acquired jurisdiction or control over the subject of the particular action, and of the parties thereto, by and in the methods recognized or prescribed by law. It acquires its jurisdiction of the plaintiff when he comes into court

> invoking its action. It acquires jurisdiction of the subject of the particular action by the filing of the sufficient complaint or other proper pleading or petition. And it acquires jurisdiction of the defendant or party other than plaintiff by the lawful service upon it of proper legal process or by its voluntary appearance in the action and submission to the court's jurisdiction over it."

In the case at bar all fundamentals of procedure were ignored by the respondents. The statements of this court in the Wooras case are not statements of newly discovered principles but are of basic reiterations and fundamental propositions in a most erudite and concise manner. The law as it now stands should, in our opinion, resolve the issues in favor of the appellant.

Respectfully submitted,

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